

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of B. PAKULSKI, Minor.

UNPUBLISHED

June 10, 2014

No. 318535
St. Clair Circuit Court
Family Division
LC No. 13-000112-NA

In the Matter of N. PAKULSKI, Minor.

No. 318539
St. Clair Circuit Court
Family Division
LC No. 13-000111-NA

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

In these consolidated appeals, respondent father appeals as of right from orders terminating his parental rights to his two children pursuant to MCL 712A.19b(3)(b)(i) (parent abused the child), (j) (child would likely be harmed if returned to the parent), and (k)(iii) (battery, torture or severe abuse). Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In Docket No. 318539, the record reveals that on February 18, 2013, respondent was caring for his seven-week-old child upon the mother's return to work following maternity leave. Respondent lifted the child from an infant swing and heard a "pop." The child screamed and respondent knew something was wrong. Respondent subsequently unwrapped the child and the child's arm "flopped out." He immediately called the mother and they took the child to the emergency room at Port Huron Hospital. An x-ray did not reveal a fracture and the parents were sent home with orders to take the child to Children's Hospital the following week. The parents

went to Children's Hospital on February 25, at which time it was discovered that the child had a broken left arm.¹

The termination hearing took place before a referee. The Department of Human Services (DHS) presented numerous experts who testified that the child, who was young and immobile, could not have injured himself and that respondent's version of what occurred did not fit with the child's injury. Respondent presented his own expert who testified that such a break may not have been attributable to abuse. The referee found by a preponderance of the evidence that the child came within the court's jurisdiction, but declined to find by clear and convincing evidence that a statutory basis existed to terminate respondent's parental rights. Specifically, the referee noted that there was a difference of opinion as to whether the injury was the result of abuse.

Both the DHS and the children sought de novo review from the trial court judge. The trial court declined to accept the referee's recommendation and, instead, concluded that the record provided clear and convincing evidence to terminate respondent's parental rights. Respondent now appeals as of right.

II. EXPERT TESTIMONY

Respondent argues that the court abused its discretion under MRE 702 and MRE 703 by allowing certain testimony of the expert witnesses. We disagree. A trial court's decision to admit expert testimony is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76-78; 684 NW2d 296 (2004). An abuse of discretion occurs when the court selects an outcome outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Respondent contends that the trial court abused its discretion when it permitted Dr. Mary Lou Angelilli to testify that she found it concerning that the child was not brought back to the hospital for the second visit sooner when it was described that he seemed to be in pain. Respondent argues that this testimony was not supported by any facts in evidence. We disagree. Because respondent did not object to this testimony on the record, he must demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The admission of expert testimony is controlled by MRE 702 and 703. Under MRE 702, the court may admit expert testimony that will assist the trier of fact if the testimony is "based on sufficient facts or data" and is "the product of reliable principles and methods" and if the expert "has applied the principles and methods reliably to the facts of the case." MRE 703 states that the facts or data used by the expert "shall be in evidence" or, at the court's discretion, "admitted in evidence thereafter."

¹ The case in Docket No. 318535 concerns respondent's two-year-old son with a different mother. There were no allegations of child abuse concerning this child.

The record reveals that Dr. Angelilli, an expert in pediatric medicine and child abuse, had earlier testified, without objection, that respondent had told her that after the initial emergency room visit the child continued to act as if he was in pain and the arm swelled up. Respondent did not dispute that testimony. Accordingly, there was evidence that the child was in pain during the period between the first and second visit to the hospital, and Dr. Angelilli's testimony was based on sufficient facts in evidence. Respondent cannot demonstrate plain error that affected his substantial rights. MRE 702; MRE 703; *Carines*, 460 Mich at 763.

Next, respondent contends that the trial court abused its discretion when it permitted Dr. Angelilli to testify regarding the child's condition on February 18, because she had not reviewed any medical records from that emergency room visit. Because respondent did not object to this testimony on the record, he must demonstrate plain error affecting his substantial rights. *Carines*, 460 Mich at 763. Dr. Angelilli had reviewed the x-ray from February 25, which showed a "separation or displaced fracture." She was provided the evidence that other medical professionals, who reviewed the x-ray from February 18, did not discern any separation or displacement of the bones. She was then asked to give her opinion, "based on [her] experience," about whether that would be "unusual." She was not asked to opine concerning whether the x-ray from February 18 had been read correctly by the other medical professionals and she was not asked to give her opinion concerning the earlier x-ray. She was merely asked to opine on whether it was "usual" or common that there could have been such a radical change in the child's condition in such a short period of time solely based on the passage of time. Based on her knowledge and experience and the data she reviewed, along with the evidence provided, Dr. Angelilli presented her opinion. Dr. Angelilli's testimony was based on facts in evidence, and was clearly admissible under MRE 702.

Respondent also argues that the court abused its discretion when it permitted Dr. Daniel Shogren to testify outside his area of expertise. We disagree.

Dr. Shogren was qualified as an expert in radiology. During his testimony, he was asked to opine regarding what kind of "mechanism would be necessary to cause such a fracture." Over respondent's objection that the question required an answer that was outside of his specialty, the court permitted Dr. Shogren to answer it. We find that a radiologist with Dr. Shogren's expertise and experience would have knowledge concerning the structure of bones and the force it would take to fracture a particular bone. Therefore, his testimony is not precluded by MRE 703. *Morales*, 279 Mich App at 735. We find that it would not be outside "the range of reasonable and principled outcomes" for an experienced radiologist to opine on the force required to cause a specific fracture. In addition, Dr. Shogren's testimony was cumulative to the testimony of the other medical professionals who found that it would take significant force to cause the fracture of the humerus. Accordingly, we find that the trial court did not abuse its discretion in permitting Dr. Shogren to answer the question concerning what "mechanism would be necessary to cause such a fracture."

III. STATUTORY GROUNDS FOR TERMINATION OF RESPONDENT'S PARENTAL RIGHTS

Respondent next argues that the trial court clearly erred in finding clear and convincing evidence to terminate his parental rights. We disagree.

“To terminate parental rights, a trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence.” *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). “This Court reviews for clear error the trial court’s factual findings and ultimate determinations on the statutory grounds for termination. The trial court’s factual findings are clearly erroneous if the evidence supports them, but we are definitely and firmly convinced that it made a mistake.” *In re White*, 303 Mich App 701; ___ NW2d ___ (2014), slip op p 4 (footnotes omitted). If a trial court finds that a statutory basis for terminating parental rights exists by clear and convincing evidence, it is required to terminate parental rights if “it finds from a preponderance of evidence on the whole record that termination is in the children’s best interests. We review for clear error the trial court’s determination regarding the children’s best interests.” *White*, slip op p 6.²

The court found that termination of respondent’s parental rights was justified under MCL 712A.19b(3)(b)(i), (j), and (k)(iii), which provide:

The court may terminate a parent’s parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

(iii) Battering, torture, or other severe physical abuse.

² On appeal, respondent makes no argument regarding the best interests of the children. His focus is entirely on whether the trial court committed clear error in finding that clear and convincing evidence existed to terminate his parental rights.

Respondent takes issue with several of the trial court's findings of fact in support of its opinion to terminate respondent's parental rights.

Respondent first contends that the court clearly erred in finding that the child was in pain between February 18 and February 25, because the evidence did not support this finding. We have already addressed this issue in terms of the admissibility of the evidence. Having found that the opinion testimony was admissible and supported by the evidence, we further find that the trial court did not clearly err in making this finding of fact in its opinion.

Respondent next argues that the trial court clearly erred in finding that, following their first visit with the child to the emergency room, respondent and the child's mother were told to follow up with a pediatrician and did not do so. Our review of the record does not reveal testimony to support this finding. Instead, it appears that the trial court was referring to allegations in the termination petition. However, even if the trial court erred in making this finding, it is clearly not dispositive.

Next, respondent contends that the trial court clearly erred when it found that Dr. Angelilli had reviewed the x-rays that were taken on February 18. However, the trial court did not find that Dr. Angelilli had reviewed those x-rays. It found that she "reviewed the *reports* of the X-rays" that were taken on February 18. Dr. Angelilli testified that she reviewed the *records* from February 18 but did not review the x-rays. We find that "reports" and "records" are interchangeable, but separate from "x-rays." Thus, the court did not find that she had reviewed the x-rays from February 18, and the court did not err in its finding of facts.

Respondent next claims the trial court clearly erred when it relied on Dr. Angelilli's opinion regarding the displacement of the fracture because her opinion was based upon facts of which she had no personal knowledge. Again, we disagree. Having earlier held that the trial court did not abuse its discretion in permitting Dr. Angelilli to give her opinion concerning the fracture, we further find that the trial court did not clearly err in including that opinion in its findings of fact.

Next, respondent contends that the trial court clearly erred when it stated that Dr. Bethany Mohr "described the fracture in like terms as Dr. Angelilli." Respondent argues this finding was error because Dr. Mohr did not testify regarding when the fracture occurred, how it was caused, or state her opinion concerning the x-rays taken on February 18. There is no merit to this claim of error. The court found that Dr. Mohr's testimony was similar to that of Dr. Angelilli, and then provided examples of how it was similar. They both had testified that (1) the child was incapable of causing this injury on his own, (2) a break of this nature would require a significant amount of force, (3) respondent had admitted that he was responsible for the injury, and (4) the amount of force required to cause the break was not consistent with respondent's report of how it had occurred. They both had been asked and testified about other medical conditions that could have caused the bone to break, and they both found that there was no medical cause for the break. The fact that the trial court did not compare every word spoken by the two experts, word for word, does not constitute clear error.

Next, respondent contends that the trial court erroneously relied on Dr. Shogren's testimony that the child had two separate injuries. Respondent relies on his earlier argument that

there was no testimony to support this finding because there was no evidence that the child had been in pain during the time between the two x-rays. Again, we find no merit to this claim. As we earlier found, there was testimony from Dr. Angelilli that respondent told her that the child was in pain during the time between the two hospital visits. The fact that there was no noticeable fracture in the first x-ray and that the bones were noticeably separated in the second x-ray supported a finding of two separate injuries.

Finally, respondent contends that the trial court clearly erred by giving more weight to Dr. Shogren's testimony than the testimony of Dr. Michael Shier, respondent's expert witness. The court made extensive findings concerning Dr. Shier's testimony and concluded that his testimony was "incredible in light of the testimony of the radiologist as well as Dr. Mohr and Dr. Angelilli, taken together with his obvious bias regarding child abuse complaints." This Court will give deference to the trial court's superior ability to judge credibility and the weight to be afforded evidence, MCR 2.613(C); *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003). The trial court made extensive findings and its conclusion that Dr. Shier's testimony was incredible was based on sound reasoning and was supported by the testimony of three other experts.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Kirsten Frank Kelly